IN THE

Supreme Court of the United States

October Term, 1979

No. 79-471

MICHAEL E. STRINGER,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

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September 19, 1979.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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The petitioner, Michael E. Stringer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of California, Fourth District on April 23, 1979.

Opinions Below.

The opinion of the Court of Appeal of California, Fourth District, not reported, appears as Appendix A hereto. The denial of a petition for hearing by the Supreme Court of California appears as Appendix B.

Jurisdiction.

The judgment of the Court of Appeal was entered on April 23, 1979. A timely petition for a hearing was presented to the Supreme Court of California and was denied by that court on June 27, 1979. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction was invoked under 28 U.S.C. Section 1257(3).

Questions Presented.

1. Whether the lower courts deprived petitioner of due process notice of charges by holding he could be convicted of the crime of possession of explosives without a permit as a necessarily lesser included charge within the crime of reckless possession of explosives in specified public places or places of private habitation.

2. Whether a statute proscribing possession of solid head tracer shells but exempting from any penalty possession of shotgun tracer shells creates a classification in furtherance of a compelling state interest and which is necessary to fulfilling such interest.

3. Whether the legislature acted arbitrarily and unreasonably in declaring solid head tracer shells proscribed destructive devices.

Statutory Provisions Involved.

California Health and Safety Code:

Section 12305. Unlawful possession

"Every person not in the lawful possession of an explosive who knowingly has any explosive in his possession is guilty of a felony."

Section 12303. Lawful possession

" 'Lawful possession of an explosive,' as used in this chapter, means possessing explosives in accordance with the stated purpose and conditions of a valid permit obtained pursuant to the provisions of this part, unless such person is specifically excepted from the permit requirements by the provisions of this part."

California Penal Code:

Section 12303.2 (Possession in public or private place or on common carrier vehicle)

"Every person who recklessly or maliciously has in his possession any destructive device or any explosive on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or near any aircraft, railway passenger train, car, cable road or cable car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of a felony, and shall be punished by imprisonment in the state prison for a period of not less than five years."

Section 12301 (Definition)

"(a) The term 'destructive device,' as used in this chapter, shall include any of the following weapons:

(1) Any projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns.

(2) Any bomb, grenade, explosive missile, or similar device or any launching device therefor.

(3) Any weapon of a caliber greater than .60 caliber which fires fixed ammunition, or any ammunition therefor, other than a shotgun or shotgun ammunition.

(4) Any rocket, rocket-propelled projectile, or similar device of a diameter greater than 0.60 inch, or any launching device therefor, and any rocket, rocket-propelled projectile, or

similar device containing any explosive or incendiary material or any other chemical substance, other than the propellant for such device, except such devices as are designed primarily for emergency or distress signaling purposes.

(5) Any breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.

(b) The term 'explosive,' as used in this chapter, shall mean any explosive defined in Section 12000 of the Health and Safety Code."

Statement of the Case.

By Information filed February 22, 1977 in the Superior Court for the County of San Bernardino, petitioner was charged in Count I with a felony violation of Penal Code Section 12303.2, Reckless Possession of Explosives, in Count II with a felony violation of Penal Code Section 12303, Possession of a Destructive Device, and in Count III with a felony violation of Penal Code Section 12220, Possession of a Machine Gun. On February 28, 1977, petitioner was arraigned and entered a plea of "not guilty". On May 23, 1977, petitioner moved to Set Aside the Information pursuant to Penal Code Section 995, to Suppress Evidence pursuant to Penal Code Section 1538.5, and to Quash and Traverse the Search Warrant; all motions were argued and submitted. On May 26, 1977, all motions were denied.

On August 25, 1977, both sides waived jury, and a Court Trial commenced before the Honorable Joseph

A. Katz, Judge Presiding, in the Superior Court of San Bernardino County. Trial continued on August 30, August 31, and September 1. On September 2 The People having rested, petitioner moved under Penal Code Section 1118 for a Judgment of Acquittal, which matter was taken under submission, and both sides argued. On September 1, 1977, the Court acquitted petitioner of Count I, Penal Code Section 12303.2 but found petitioner guilty of a "lesser and necessarily included offense", Health and Safety Code Section 12305, a felony; the Court found petitioner guilty of Count II, Penal Code Section 12303, a felony, and found petitioner not guilty of Count III, Penal Code Section 12220.

On October 31, 1977, petitioner moved for a new trial, which motion was denied. On December 19, 1977, at the time of the Probation and Sentence Hearing, the Court withheld Judgment as to Count I, a felony, and granted probation for a period of five years on certain terms and conditions. As to Count II, the Court imposed a fine of $1,000.00 on petitioner thus making Count II a misdemeanor under Penal Code Section 17(b)(1). Thereafter, on February 15, 1978, a timely Notice of Appeal was filed from the Order Granting Probation/Judgment of Conviction.

Statement of Facts.

On December 13, 1976, Glenn C. Torres, a citizen, and two Sheriff's Deputies appeared with a Deputy District Attorney in the Victorville Division of the San Bernardino Municipal Court before the Honorable William J. Johnstone; oral statements under oath were taken, pursuant to the provisions of Penal Code Section 1526(b) for the purpose of obtaining a search warrant

for premises located at 1887 Thrush, Wrightwood, California. Additional testimony was taken on December 14, 1976, at the conclusion of which Judge Johnstone issued a search warrant. During the search warrant testimony, Torres testified that in June or July of 1976 he had assisted petitioner in constructing a workbench in the back of the garage at 1887 Thrush, Wrightwood. At that time, he observed two empty hollow cavities in the bench. Two days later, he again visited the Thrush property, but did not go in the garage; while in the living room of the house, he observed pillowcases with lumps in them that "had the texture of the military type pineapple grenades." He also observed ten "ammunition boxes". Deputy Charles Wideen testified that on December 11, 1976, certain guns, red cans, and explosives were found in Lone Pine Canyon, about six miles from the Thrush property. Torres had been taken to the canyon location and stated that the red "ammunition" cans were similar to items he had seen in the living room at 1887 Thrush back in the summer of 1976.

Charles Wideen testified that he executed the search warrant on the premises at 1887 Thrush in the afternoon of December 14, 1976. A fifty pound sack of nitro carbo nitrate, detonating cord, and an orange safety fuse were discovered in a "bedroom" of the house at 1887 Thrush; these items were the "explosives" alleged in Count I of the Information. After discovery of these items, news media representatives and individuals who at the time were smoking were allowed into

the room where the alleged explosives were, and the explosives were removed from the house without any particular precautions. There was conflicting testimony about the possible danger of explosion, and ultimately the distinguished Trial Judge held that The People had not established "reckless possession".

Mr. Wideen testified that during the course of the search, the top of the workbench in the garage was removed, and several cans of ammunition were removed. The People argued that some of this ammunition was "tracer ammunition" and thus constituted "destructive devices" so as to form the basis for Count II of the Information. There was testimony to the effect that subsequently, when certain rounds of the seized ammunition were fired, a few of them seemed to give off a "tracer effect". There was no testimony or chemical evidence offered or received that any of the ammunition contained any explosive or incendiary material.

The bulk of the testimony at trial dealt with the question of whether or not a gun taken from the workbench was in fact a "machine gun" as alleged in Count III. The People contended that the gun was an M-2, and thus a machine gun, whereas petitioner contended that the gun was an M-1 rifle. After the hearing of conflicting expert testimony, the Trial Court acquitted petitioner of that Count.

There was no testimony that anyone had ever observed petitioner in actual possession of the alleged

explosives or tracer ammunition. In order to attempt to establish possession, The People introduced a certified copy of a Grant Deed as People's No. 52, by which Douglas Stringer deeded a piece of property to Michael E. Stringer. People's No. 53, as introduced, was a certified copy of a Probate Order and Decree of the Los Angeles Superior Court in which certain real property in the County of San Bernardino was left to Michael Stringer. The People also introduced People's No. 55, a three page exhibit containing a duplicate of a 1976/77 tax bill from the Office of the San Bernardino County Tax Collector. It indicated Parcel No. 356 085 09 to be in the name of "Stringer, Michael" and Parcel No. 356 085 08 to be in the names of "Stringer, Michael E. and Marjorie L."

ARGUMENT.

POINT I.

The Lower Courts Deprived Petitioner of Due Process Notice of Charges by Holding He Could Be Convicted of the Crime of Possession of Explosives Without a Permit as a Necessarily Lesser Included Charge Within the Crime of Reckless Possession of Explosives in Specified Public Places or Places of Private Habitation.

Petitioner herein maintains that since one *can be* in reckless possession of explosives, even though one might have a permit for explosives, possession without a permit is not a *necessarily* included offense within reckless possession of explosives. Because the lower courts held to the contrary, petitioner was thereby deprived of due process of law (notice of charges).

A. The Substantive Statutes at Issue.

In Count I, petitioner was charged with "reckless possession" (only) of explosives in violation of Penal Code Section 12303.2 which condemns everyone who "recklessly or maliciously has in his possession" explosives on or near specified public places or places of private habitation. Although acquitted of this offense, the Trial Court convicted petitioner of violation of Health and Safety Code Section 12305 which states:

> "Every person not in the lawful possession of an explosive who knowingly has any explosive in his possession is guilty of a felony."

The Court of Appeal upheld this action, stating this section condemned "*any*" unlawful possession (Appendix A, p. 6).

In so doing, the Court of Appeal ignored the plain wording of Health and Safety Code Section 12303 which states:

> "Lawful possession of an explosive, *as used in this chapter,* means possessing explosives in accordance with the stated purpose and conditions of a valid permit obtained pursuant to the provisions of this part . . ."

Health and Safety Code Section 12303.2 is a "part" of Chapter 7, along with Section 12303.

Thus, Health and Safety Code Section 12303.2 (of which petitioner was convicted) should read:

> "Every person not (possessing explosives in accordance with the stated purpose and conditions of a valid permit obtained pursuant to the provisions of this part) who knowingly has (such) explosive in his possession is guilty of a felony."

Thus, it must be remembered the *only* "unlawful possession" condemned by Health and Safety Code Section 12303.2 is possession *without a permit.*

B. The Reason for and Test of Necessarily Included Offenses.

The basic reason why an offense must *necessarily* be lesser included for a defendant to be convicted of it relates to the fundamental due process requirement of "notice and an opportunity to defend". As Justice Jefferson succinctly stated the matter:

> "The basic reason for not permitting a defendant to be convicted of an offense not charged in the information as a lesser but necessarily lesser included offense is that due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." *In Re Johnny V.,* 85 Cal.App.3d 120, 136 (1978).

In the instant case, petitioner did not even have the "blessing" of being surprised by respondent's evidence. Rather, he was not presented with respondent's "lesser included" position until both parties had rested their cases and respondent's counsel was engaging in closing argument.

Arguably, the respondent's case did not even meet its burden of proof under Section 12303, since certain persons are "specifically excepted from the permit requirements" of that part. Respondent did not as part of its case negate petitioner's entitlement to these exceptions.

The test for determining whether an offense is necessarily lesser included was clearly ignored and violated in this case. As stated in *People v. Escarcega,* 43 Cal.App.3d 391 (1974), the test is whether "considered in the abstract," *Id.* at 397, the offense "cannot be committed," *Id.* at 397, without committing the higher offense. See also: *People v. Preston,* 9 Cal.3d 308 (1973); *In Re Johnny V.,* 85 Cal.App.3d 120 (1978).

C. Application of the Lesser Included Test.

Applying this test to the instant case, it is manifest that *considered in the abstract* the "without a permit" section will not always be violated when one violates the "reckless possession" section.

For example, an owner of a demolition company could obtain a permit to demolish a downtown building as part of urban redevelopment. Hoping to really put

on a show for the press he could then double the "normal charge", thus demolishing the subject building and the ones on either side (or be apprehended right before the ignition). Such possession clearly would be "reckless", yet done *with a permit*.

Analogizing to another area, can it be said that "driving without a driver's license" is a necessarily lesser included offense of reckless driving under Vehicle Code Section 23103? California courts have held that possession of a driver's license is not even relevant to the issue of simple negligence, let alone recklessness. *Shimatovich v. New Sonoma Creamery,* 187 Cal.App.2d 342 (1960). It is not the presence *vel non* of the permit, but the facts which decide the issue, *Id.*

In the case *sub judice*, the lower (Trial Court) acquitted the petitioner of recklessness.

In summary, petitioner was convicted of an offense of which he was not given due notice, did not have an opportunity to defend against, and which need not necessarily be committed in order to violate the main charge.

POINT II.

A Statute Proscribing Possession of Solid Head Tracer Shells but Exempting From Any Penalty Possession of Shotgun Tracer Shells, Creates a Classification Not in Furtherance of a Compelling State Interest nor Which Is Necessary to Fulfilling Such Interest.

A. The Substantive Statute at Issue.

On Count II the petitioner was convicted of violation of Penal Code Section 12303, possession of a destructive device, to wit: solid head tracer ammunition. Petitioner herein maintains there is no compelling state

interest justifying Section 12301 (the definitional section of Section 12303) which prohibits solid head but not shotgun tracer shells, nor is such distribution necessary to any such purpose.

Section 12301 states, in pertinent part, that destructive devices shall include:

> "(1) Any projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, *except tracer ammunition manufactured for use in shotguns.*" (Emphasis added).

Thus, the statutory definition creates two classes of individuals, to wit: (1) those who possess solid head tracer shells and thus are potential felons, and (2) those who possess shotgun tracer shells and may do so with impunity.

B. The Test for an Equal Protection Violation.

Since Section 12301 defines a penal statute resulting in loss of liberty the appropriate test is as follows:

> "The equal protection clause fully applies to all penal statutes and manifestly a penal statute which prescribes a substantial penalty touches a constitutionally protected right—the personal liberty of one convicted of violating it. Classifications within such a statute must be subjected to critical scrutiny, and the law itself can withstand constitutional challenge only if the state establishes. . . . that it has a *compelling* interest which justifies the law and then demonstrates that the distinctions drawn by the law are *necessary* to further that purpose." *Cotton v. Municipal Court,* 59 Cal.

App.3d 601, 605, 606 (1976) (citations omitted; Court's emphasis). Accord, *Bolling v. Manson*, 345 F.Supp. 48 (D. Conn. 1972).

C. The Application to the Instant Case.

No justification was presented by the lower appeals court supporting the ban of one type of tracer shells but not the other. More importantly, no real justification was presented demonstrating a compelling state interest in banning any type of tracer shells (see Point III, *infra*). Petitioner clearly pointed out to the lower court the statutory anomaly, yet no response was made.

If tracer shells are inherently more dangerous than others, then why are solid head ones so serious as to be felonious and shotgun ones so innocuous as to be exempted?

In making this argument, petitioner wishes to emphasize this is not a case where the legislature has mentioned only one "sub-class of items" (*e.g.*, certain drugs) and "ignored" others. Rather, it is a case where the legislature has considered *both* sub-classes and *affirmatively exempted* one.

This distinction petitioner submits is not affirmatively supported and hence the entire tracer shell classification must fall.

POINT III.

The Legislature Acted Arbitrarily and Unreasonably in Declaring Solid Head Tracer Shells Destructive Devices.

A. The Statute at Issue.

In Penal Code Section 12301 the legislature declared solid head tracer shells (even if of .22 caliber) to be "destructive devices" along with grenades, bombs,

rockets and Molotov cocktails. Petitioner submits such classification is so arbitrary and capricious as to violate substantive due process of law.

B. The Test to Be Applied.

Although the legislature's police power is broad, it may not act arbitrarily or capriciously in establishing penal offenses. *Nebbia v. New York*, 291 U.S. 502 (1948); *Gray v. Whitmore*, 17 Cal.App.3d 1, 20, 21 (1971).

Evidence of the arbitrariness of Section 12301 is found in the fact (pointed out to both lower courts) that 48 of the 50 states and the federal government *do not* ban tracer ammunition (only California and South Dakota purport to). The near unanimous actions of sister jurisdictions clearly are relevant to the issue of legislative unreasonableness. See *In Re Lynch*, 8 Cal.3d 410 (1972) (sister jurisdiction standards a test of cruel and unusual punishment). Accord, *Leland v. Oregon*, 343 U.S. 790 (1952) (due process test).

Additional evidence of legislative unreasonableness is found in application of the principle of *ejusdem generis*. This principle tells us the legislature usually classifies "like things" together.

To classify small caliber *solid head* tracer shells with grenades, rockets, bombs and Molotov cocktails (and concomitantly to exempt shotgun tracer shells) seems a good deal more than a bit "out of place."

To be sure, petitioner here wishes to emphasize that he does not assert *ejusdem generis* as the *sine qua non* of a violation of substantive due process. He simply maintains that it, *along with* the national

standard discussed previously, and *in light of* the irrational (Point II, *supra*) scheme, discloses arbitrary and unreasonable action under the guise of the police power.

Conclusion.

In this case petitioner was (on Count I) convicted of an alleged lesser included offense which had no real relationship to the main offense of which he was charged, and of which he had no notice until the prosecutor's closing argument. Such action clearly violates fundamental due process of law.

On the other Count, petitioner was convicted of violation of a statute not making those distinctions necessary to a compelling state interest, and which can only be described as arbitrary, whether judged by the standards of other jurisdictions, or by its own internal logical consistency.

For the above reasons, petitioner requests that this Honorable Court grant a writ of certiorari and that the decision of the Court of Appeal of the State of California, Fourth District, Division Two, be reversed.

Dated: September 19, 1979.

Respectfully submitted,

PHILIP COHEN,

Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal.

NOT TO BE PUBLISHED IN
OFFICIAL REPORTS

Court of Appeal, Fourth District, Second Division, State of California.

The People of the State of California, Plaintiff and Respondent, v. Michael E. Stringer, Defendant and Appellant. 4 Crim. 9868 (Super. Ct. No. CR-178 (VIC)).

Filed: April 23, 1979.

APPEAL from the Superior Court of San Bernardino County. Joseph A. Katz, Judge. Affirmed.

Thomas Hunter Russell for Defendant and Appellant.

Evelle J. Younger, Attorney General, Karl J. Phaler and Jay M. Bloom, Deputy Attorneys General, for Plaintiff and Respondent.

THE COURT

Defendant was convicted of unlawful possession of explosives (Health & Saf. Code, § 12305) and possession of a destructive device (Pen. Code, § 12303) following a court trial, a jury trial having been waived. He is appealing from the judgment (order granting probation).

Defendant contends that (1) the court erred in denying his motion to quash the search warrant, (2) he was improperly convicted of unlawful possession of explosives (Health & Saf. Code, § 12305) because that crime is not a necessarily included offense within the crime with which he was charged, reckless possesion of destructive devices in a private habitation (Pen.

Code, § 12303.2), (3) the evidence is insufficient to show that he possessed the contraband, (4) the evidence is insufficient to show that the ammunition he possessed was a destructive device, and (5) Penal Code section 12303 is unconstitutional because it proscribes possession of tracer bullets.

FACTS

In June or July of 1976, Glenn Torres built a reinforced concrete workbench for defendant in the garage of defendant's residence in Wrightwood. Torres had performed odd jobs for defendant on prior occasions. The workbench had two hollow cavities that were four feet long, four feet wide and four feet deep. Torres testified that defendant had a military half-track parked in his garage.

Several days after completing the bench, Torres returned to defendant's residence. As Torres walked toward the garage, he observed defendant and several other persons involved in clandestine activities in the garage. Defendant, who appeared nervous, quickly met Torres and escorted him to the house.

In defendant's living room, Torres observed a number of pillow cases that contained 20 to 25 carbines, including burp guns, and automatics; ammunition; and a number of pineapple-type military hand grenades. He also saw what appeared to be magazines and banana clips (ammunition). On three occasions defendant entered the living room and carried the pillow cases and weapons to the garage.

Defendant habitually wore military clothes and drove military vehicles with military stars and numbers on them. Once when Torres remarked to defendant that

he had everything but a .50 caliber machine gun on top of the half-track, defendant replied that he had that more or less squared away.

On December 11, 1976, San Bernardino County Deputy Sheriff Charles Wideen went to Lone Pine Canyon and observed a recoilless rifle, a mortar, a bazooka, parts of 30 and 50 caliber machine guns, over 10,000 rounds of ammunition, explosive devices, metal drums, booby trap devices, explosives, an anti-tank gun and military manuals about guerrilla warfare, survival and weaponry. It appears that these items had only been in the canyon several days. The area around defendant's house was sparsely populated and this cache of weapons was found along the road that led to defendant's residence, which was located six miles away.

When San Bernardino County Deputy Sheriff Patrick Dailey showed Torres some of the weapons found in Lone Pine Canyon, Torres stated that they were similar to some of the weapons he had previously seen at defendant's residence. Carpeting found in the canyon matched the carpeting in defendant's residence.

Deputy Dailey also testified that other persons had also seen weapons at defendant's residence and defendant had approached an individual in an attempt to sell a gun.

On the basis of this information, a search warrant was issued for defendant's residence, including his garage, and two of his military vehicles on December 14, 1976. When the search warrant was executed a large amount of weapons and ammunition, including tracer ammunition and a 50-pound bag of a blasting agent known as Hercules nitro carbo nitrate and two coils each of safety fuse and detonating coil were seized.

VALIDITY OF SEARCH WARRANT

Initially, defendant contends that the lower court erred in denying his motion to quash the search warrant and suppress the evidence seized when the search warrant was executed because (1) the information presented to the magistrate was stale, (2) Torres' testimony as to what he observed in July 1976 was mere speculation and (3) the proceedings before the magistrate were defective because the parties went off the record on four separate occasions.

The search warrant was issued based upon testimony presented under oath to the magistrate by the affiant, Deputy Dailey, on December 13 and 14, 1976. He related the citizen informant's statements to him concerning his observations when he had been at defendant's residence.

Defendant argues that the information provided by the citizen informant, Torres, concerning his observations at defendant's residence in June or July was stale and did not provide probable cause to believe weapons would be found on the premises in December when the search warrant issued.

Affidavits for search warrants must be tested and interpreted in a common sense manner so as not to discourage police officers from seeking search warrants before acting and the resolution of doubtful and marginal cases should be largely determined by the preference to be accorded to warrants. (*People v. Mesa,* 14 Cal.3d 466, 469.)

While the weapons and ammunition had been observed by Torres at defendant's residence half a year prior to issuance of the search warrant, there was other testimony presented that provided sufficient probable cause to believe that contraband was currently located in the residence. The large cache of arms and ammunition was discovered in a canyon off a road that led to defendant's residence in a sparsely populated area six miles away three days before the issuance of the warrant. The arms and ammunition, which had only been in the canyon several days, appeared similar to the arms and ammunition that Torres had seen at defendant's residence the prior summer. Carpeting found with the weapons in the canyon matched carpeting in defendant's residence. Based on all the information presented in support of the issuance of the search warrant, it was reasonable for the magistrate to conclude there would still be weapons and arms at defendant's residence.

While defendant argues that Torres' statements concerning his observations at defendant's residence were mere speculation and conjecture, a close examination of the record before us reveals that there is no merit in this argument. Torres, who had served in the military and thus was familiar with items of this nature, stated he saw gunstocks, pineapple-type hand grenades, the outline of burp guns, square ammunition boxes and other similar items. There was nothing speculative about these observations.

Defendant also argues that the proceedings before the magistrate pursuant to Penal Code section 1526, subdivision (b), were defective because these proceedings went off the record on four different occasions. There is no merit in this argument. The deputy district attorney present when the oral testimony was heard by the magistrate stated in an affidavit considered by the lower court that all of the off the record conversations related only to the format of the testimony

being adduced and not to matters affecting probable cause.

Consequently, the lower court did not err when it denied defendant's Penal Code section 1538.5 motion to quash the search warrant and suppress evidence seized when the search warrant was executed.

NECESSARILY INCLUDED OFFENSE

In count I of the information, defendant was charged with reckless possession of explosives in a private habitation in violation of Penal Code section 12303.2. Defendant contends the court erred when it found him guilty of unlawful possession of explosives in violation of Health and Safety Code section 12305 because the latter offense is not necessarily included within the former.

A defendant may be convicted of any offense charged in an information and any offense included within the charged offense. It has been held that possession of explosives (Health & Saf. Code, § 12305) is a lesser and necessarily included offense within the offense of reckless possession of explosives in a private habitation (Pen. Code, § 12303.2). (*People v. Westoby*, 63 Cal.App.3d 790, 795.)

We can find no merit in defendant's argument that Health and Safety Code section 12305 is not a lesser and necessarily included offense because it *only* proscribes unlawful acquisition while Penal Code section 12303.2 proscribes all use of explosives in an unlawful manner. A plain reading of Health and Safety Code section 12305 indicates that it proscribes *any* unlawful possession of explosives, including unlawful acquisition and unlawful use, and thus one cannot violate Penal Code section 12303.2 without violating Health and Safety Code section 12305.

We need not concern ourselves with defendant's further arguments as to whether a defendant can be charged with both offenses and whether a conviction of one bars a conviction of the other since they are not a test of whether one offense is included within the other offense but, rather, are rules which apply after it is determined one offense is included within another offense.

SUFFICIENCY OF THE EVIDENCE OF POSSESSION

Defendant contends that there was insufficient evidence to show that he possessed the contraband that was seized when the search warrant was executed at the residence in Wrightwood.

"An appellate court must view the evidence in a light most favorable to respondent, presuming in support of the judgment the existence of every fact which can reasonably be deduced from the evidence." (*People v. Strickland*, 11 Cal.3d 946, 952.)

We have examined the record on appeal and conclude that there was ample evidence that defendant possessed the contraband. Defendant hired Torres to construct a workbench in the garage. Torres saw defendant at the residence on almost all of the occasions when he was at the residence. Written documents admitted into evidence indicated defendant owned the residence. Moreover, there was no evidence that any other person had access to the contraband.

SUFFICIENCY OF EVIDENCE OF A DESTRUCTIVE DEVICE

Defendant contends that the evidence is insufficient to show that the ammunition used to support his conviction for possession of a destructive device (Pen.

Code, § 12303) contained any explosive or incendiary material.

Penal Code section 12301, subdivision (a)(1) defines destructive device as "[a]ny projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, . . ."

When viewed in the light most favorable to the judgment, as required by the usual rules governing appellate review, the evidence presented at trial is more than sufficient to show that the ammunition was tracer ammunition. The ammunition was test fired on July 13, 1977, and two witnesses testified on the basis of their observations and their expertise that the ammunition was tracer ammunition.

CONSTITUTIONALITY OF PENAL CODE SECTION 12303

Finally, defendant contends that the proscription of possession of tracer ammunition in Penal Code section 12303 is unconstitutional as an unreasonable exercise of legislative power. He argues that there is no valid or legitimate public interest served by banning the possession of tracer ammunition.

"In the exercise of its police power, each state has the right to enact laws to promote public health, safety, morals and welfare." (*People v. Drolet,* 30 Cal.App.3d 207, 211.) Moreover, the validity of these legislative enactments will not be questioned unless their unconstitutionality clearly, positively, and unmistakably appears. (*People v. Wingo*, 14 Cal.3d 169, 174.)

Penal statutes proscribing the possession of tracer bullets are a legitimate and proper exercise of the

police power. The Legislature could reasonably conclude that the incendiary components of tracer bullets make them more dangerous to the public health and safety than regular bullets, and that there is no legitimate need for civilians to possess and use these incendiary bullets.

The judgment (order granting probation) is affirmed.

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

APPENDIX B.

(California Supreme Court Order).

Order Denying Hearing, After Judgment by the Court of Appeal Fourth District, Division Two, Crim. No. 9868.

In the Supreme Court of the State of California, In Bank.

People v. Stringer.

Filed: June 29, 1979.

Appellant's petition for hearing DENIED.

Bird
Chief Justice